

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts Southern
District of Texas
FILED

MATTHEW C. ZORN,

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6/8/2023

Plaintiff,

Nathan Ochsner, Clerk of Court

v.

Civil Action No. 4:22-cv-02396

U.S. DEPARTMENT OF JUSTICE, ET
AL.

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Defendants.

ZORN'S SURREPLY OPPOSING DEFENDANTS' PARTIAL MOTION TO DISMISS

Having erroneously characterized my First Amendment claim in the Motion, Defendants shift gears in Reply and make new arguments. The following four points respond.

First, Defendants now appear to question standing. Their Motion did not. On the First Amendment claim, it made a single argument in a paragraph: there is no constitutional right to “obtain all the information provided by the FOIA laws.” Mot. 18 (citing SCOUTS). I agreed, but also noted that the statement doesn’t undermine my correctly stated claim. Opp. 17. So, Defendants pivot and now find fault in me not identifying “any particular proceeding in which [I] was allegedly denied access to information or any injury [I] suffered as a result.” Reply 6. This sounds in standing—which Defendants did not move on. That argument was forfeited. *Cf. Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010). A fuller summary judgment record will prove standing.

Second, these untimely gestures merely highlight the problem and part of my injury: pending/past DEA administrative proceedings are secret. This makes it impossible to identify proceeding records that a journalist/lawyer might be interested in obtaining, even with FOIA. After all, regulations require supplying identifying information. *See* 28 C.F.R. § 16.3(b). Moreover, the non-public nature of these proceedings is undeniably of public concern. *See, e.g.*,

<https://www.cbsnews.com/news/dea-handling-case-against-large-opioids-distributor-morris-dickson-questioned/> (May 24, 2023 article questioning circumstances surrounding 4 year delay in administrative proceeding); 88 Fed. Reg. 34523 (May 30, 2023) (suspending company registration days after story broke).

Third, Defendants are simply wrong. In an earlier complaint, I outlined one “particular proceeding in which [I] was allegedly denied access to information” and the “injury [I] suffered as a result.” *See* Dkt. 7 at ¶ 65-66 & Dkt 7-9. I explained how, while representing a client, I sought access to prior administrative filings/orders to use as precedent for my advocacy. *See id.* I also attached the agency’s Fall 2022 estimate—\$41,960 in advance—for 5,000 pages of **quintessentially public records** related to a **rulemaking**. This concrete incident embodies my First Amendment grievance in a particularized nutshell. Although, I omitted these granular details from my most recent pleading to streamline the document (but cite the request in a footnote, Dkt. 21 at 13 n.9), that evidence and harm didn’t go away; it is part of the record.

Finally, Defendants’ description of Fifth Circuit law is questionable. No “binding authority” I know of says the First Amendment/*Richmond Newspapers* does not provide a qualified right to timely *adjudications* or *rulemaking* records. Certainly, the case Defendants cite, *Calder v. IRS*, 890 F.2d 781, 783–84 (5th Cir. 1989), doesn’t say that. In *Calder*, the court found no constitutional right to access **IRS records of Al Capone**. This is far afield from my stated claim—a right of timely and reasonable access to DEA **administrative proceeding records**, *see* Opp. at 17. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 699 (6th Cir. 2002) (citing *Calder* and distinguishing between *investigatory* and *adjudicative* records).

Dated: June 7, 2023

Respectfully submitted,

/s/ Matthew C. Zorn

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Matthew C. Zorn

Matthew C. Zorn

WORDS

I certify that this filing has 499 words, excluding the case caption, table of contents, table of authorities, signature block, and certificates.

/s/ Matthew C. Zorn

Matthew C. Zorn